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BANK & TRUST COMPANY, formerly known as  
10 and successor to Borel Private Bank & Trust  
Company  
11

12 UNITED STATES BANKRUPTCY COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN JOSE DIVISION

15 In re:  
16 272 E. Santa Clara Grocery, LLC,  
17 Debtor.

CASE NO. 13-53491

CHAPTER 11

**SECURED CREDITOR BOSTON  
PRIVATE BANK & TRUST COMPANY'S  
OBJECTION TO DEBTOR'S COMBINED  
DISCLOSURE STATEMENT (AND PLAN  
OF REORGANIZATION) DATED  
JANUARY 17, 2014**

Disclosure Statement Hearing:

Date: February 6, 2014  
Time: 1:30 p.m.  
Judge: Hon. Stephen L. Johnson  
Courtroom: 3099

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1 **I. INTRODUCTION**

2 On January 17, 2014, debtor and debtor in possession 272 E. Santa Clara Grocery, LLC  
3 (“Debtor”) filed a proposed Combined Plan of Reorganization and Disclosure Statement<sup>1</sup> (the  
4 “Disclosure Statement”) [Dkt. No. 144]. The Disclosure Statement attempts to describe the terms  
5 of the Debtor’s proposed plan for resolving what is essentially a two-party dispute with secured  
6 creditor Boston Private Bank & Trust Company (“BPB”).<sup>2</sup> Yet, the Disclosure Statement  
7 contains various deficiencies that must be addressed before the Court can find that the “adequate  
8 information” requirement under Bankruptcy Code section 1125 is met. For the reasons discussed  
9 below, the Disclosure Statement should not be approved.

10 **II. THE DISCLOSURE STATEMENT SHOULD NOT BE APPROVED BECAUSE IT**  
11 **FAILS TO CONTAIN ADEQUATE INFORMATION UNDER BANKRUPTCY**  
12 **CODE SECTION 1125**

13 **A. Legal Standard**

14 Under Bankruptcy Code section 1125, a disclosure statement shall contain “adequate  
15 information”, which is information “of a kind, and in sufficient detail” to “enable a hypothetical  
16 reasonable informed investor...to make an informed judgment about the plan...” 11 U.S.C.  
17 § 1125. The court has an independent obligation to determine if a proposed disclosure statement  
18 meets this standard. *E.g., In re Eastern Main Electrical Cooperative, Inc.*, 125 B.R. 329, 333  
19 (Bankr. D. Maine 1991); *In re Main Street AC, Inc.*, 234 B.R. 771, 774 (Bankr. N. D. Cal. 1999).  
20 Disclosure statements may vary in content, but should include “financial information sufficient to  
21 inform the creditors of all liens, en-cumbrances, security interests, loans or other financial  
22 obligations which may impair the Debtor or [its] assets.” *In re Michael E. Malek*, 35 B.R. 443,  
23 445 (Bankr. E.D. Mich. 1983). A disclosure statement must describe how the plan will be  
24 implemented and “describe fully, completely, and in detail all transactions with insiders.” *Id.*  
25 Furthermore, risk factors to creditors must be described. *Id.* See also, *In Re Metrocraft*  
*Publishing Services, Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984).

26 <sup>1</sup> The Debtor again filed the Disclosure Statement using a model combined plan and disclosure statement  
27 promulgated for use in Chapter 11 cases filed by *individuals*, rather than for a sophisticated single asset business  
28 entity such as the Debtor.

<sup>2</sup> BPB was formerly known as Borel Private Bank & Trust Company and is the successor by merger to Borel.

1 Measured against these standards, the Debtor's proposed Disclosure Statement in this case  
2 fails and should not be approved.

3 **B. Specific Objections to the Proposed Disclosure Statement**

4 BPB's specifically objects to the Debtor's proposed disclosure statement as follows:

5 **1. The Disclosure Statement Fails to Provide Adequate Information**  
6 **Regarding Treatment of Secured Creditors**

7 Part 1 of the plan deals with Treatment of Secured Creditors. This section is confusing  
8 and misleading. Initially, it includes the Santa Clara County Tax Assessor as a participant in the  
9 class but then says the Assessor's claim has been withdrawn and has already been paid in full.  
10 Inclusion of the Santa Clara County Tax Assessor in the plan is superfluous and misleading  
11 because it suggests that an already fully satisfied and withdrawn claim is affected by the plan.  
12 This claim should be completely removed from consideration in the document.

13 The Disclosure Statement also asserts that BPB "Rights Remain Unchanged" and that it is  
14 unimpaired because it will be paid its allowed claim in full. However, the Disclosure Statement  
15 lacks any specific time frame for paying BPB's claim and ignores that BPB's rights to immediate  
16 foreclosure on its collateral are blocked. The Disclosure Statement/Plan states that the Debtor  
17 seeks to deny BPB its contractual right to interest calculated at the interest after default rate. Any  
18 delay in payment of a claim or other alteration of BPB's rights constitutes impairment. *See In re*  
19 *L & J Anaheim Associates*, 995 F.2d 940, 942 (9th Cir.1993). At this point, BPB may be forced  
20 to wait indefinitely for payment and is not correctly advised of the impact on its enforcement  
21 rights or of its right to vote on the Plan. To suggest that BPB's "Rights Remain Unchanged" is  
22 plainly false. Accordingly, the Disclosure Statement lacks adequate information and should not  
23 be approved.

24 **2. The Disclosure Statement Fails to Describe Transactions with**  
25 **Insiders**

26 The Disclosure Statement fails to "describe fully, completely, and in detail all transactions  
27 with insiders," in violation of section 1125. The major unsecured creditors in Class 2c are  
28 insiders, one of whom is the managing member and responsible person of the Debtor. The

Debtor's schedules reveal that these individuals received substantial payments from the Debtor within 90 days of the bankruptcy filing. In addition, through a Rule 2004 examination, BPB has determined that one of these individuals (Mr. Lewis) has received in excess of \$500,000 in payments within the one year period preceding the filing of the petition. The Disclosure Statement completely fails to provide any information regarding these insider transactions, why substantial preference claims do not exist and why administrative and priority claims should not be paid from recoveries from these sources rather than from BPB's collateral. *Compare*, Disclosure Statement, Part 7 (disclosing potential claims against BPB, Kimball W. Small, *et al.* and Chevron).

### 3. The Disclosure Statement Misrepresents Insiders' Voting Rights

The Disclosure Statement misrepresents the effect of a member's vote on the Plan. It provides that Class 2(c) (Insider Note Unsecured Claims) and Class 3 (Member/Owner Interests) are impaired and entitled to vote on the Plan. Even if these insider classes may be *offered the opportunity to vote*, the Disclosure Statement fails to disclose that the votes of the members of those insider classes will *not be counted*. 11 U.S.C. section 1129(a)(10). Accordingly, to the extent the Debtor is attempting to give interested parties false assurance that it will be able to secure at least one impaired consenting class based upon the insider-members' votes, the insiders should be informed that such is not the case.

### 4. The Disclosure Statement Fails To Describe The Debtor's Failure To Comply With Its Obligations As A Single Asset Real Property Debtor

Exhibit 2 of the Disclosure Statement fails to describe the fact that the Debtor admitted at the first status conference in this matter that it is a single asset real estate debtor. In addition, the Debtor fails to describe that it did not comply with its Code obligations to make payments to BPB or to file a plan within 90 days which had a reasonable probability of being confirmed. (See BPB's motion for relief from stay [Dkt. No. 78].) The Debtor's lack of compliance with its Code obligations should be disclosed to both the Court and creditors.

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1 approval of the disclosure statement should be denied.<sup>4</sup>

2 **III. BPB RESERVES FOR CONFIRMATION ITS OBJECTIONS BASED UPON THE**  
3 **REVELATIONS IN THE DISCLOSURE STATEMENT THAT THE PLAN IS**  
4 **UNCONFIRMABLE ON ITS FACE**

5 In its objections to the initial combined proposed disclosure statement and plan filed by  
6 the Debtor, BPB pointed out that the document demonstrated that the plan was unconfirmable on  
7 its face. [Dkt. 128, part IV] During the hearing held on January 9, 2013, BPB understood the  
8 Court to indicate that those objections would be dealt with during the confirmation process if the  
9 Debtor proceeds with its plan. Accordingly, BPB incorporates those objections by reference but  
10 reserves its right to assert those objections in opposition to confirmation.

11 **IV. THE DISCLOSURE STATEMENT SHOULD NOT BE APPROVED BECAUSE**  
12 **SERVICE AND NOTICE OF THE DISCLOSURE STATEMENT HEARING ARE**  
13 **DEFECTIVE**

14 Under Bankruptcy Local Rule 3017-1(a), “[t]he proposed plan and proposed disclosure  
15 statement shall be served, *with the notice*, only on the United States Trustee and the persons  
16 mentioned in the second sentence of Bankruptcy Rule 3017(a).” BLR 3017-1(a) (emphasis  
17 added). The second sentence of Bankruptcy Rule 3017(a) provides that “[t]he plan and the  
18 disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee  
19 or committee appointed under the Code, *the Securities and Exchange Commission* and any party  
20 in interest who requests in writing a copy of the statement or plan.” Fed. R. Bankr. P. 3017  
21 (emphasis added). As reflected in the proof of service of the notice of the initial hearing on the  
22 Debtor’s Disclosure Statement [Dkt. No. 111-1], as well as the separate proof of service of the  
23 Debtor’s proposed plan and Disclosure Statement [Dkt No. 111-2], the Debtor failed to serve the  
24 Securities and Exchange Commission with the requisite notice and pleadings. The Debtor has  
25 filed no proof of service showing that it cured the defective service and notice by serving either  
26 (i) the amended disclosure statement and plan on the SEC, or (ii) notice to the SEC of the  
27 continued hearing on February 6, 2014. Because the Debtor failed to comply with BLR 3017-

28 <sup>4</sup> BPB respectfully disagrees with the suggestion in the U.S. Trustee’s earlier objection [Dkt. 126] that the form  
could possibly be adapted for use in this Case given the underlying nature of BPB’s involuntary relationship with  
the Debtor and the nature and scope of disputes between the parties.

1 1(a) and Bankruptcy Rule 3017(a), notice and service remains defective, and the Disclosure  
2 Statement should not be approved.

3 **V. CONCLUSION**

4 Based upon the foregoing, BPB respectfully requests that the Court deny approval of the  
5 proposed Disclosure Statement.

7 Dated: January 30, 2014

HOPKINS & CARLEY  
A Law Corporation

9 By: /s/ Stephen J. Kottmeier

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